Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1111

ALLYN R. SIELAFF, et al.,

*Petitioner,*

vs.

SAMUEL DREW, et al.,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPPEALS FOR THE SEVENTH CIRCUIT

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. ——

ALLYN R. SIELAFF, et al.,

*Petitioner*,

vs.

SAMUEL DREW, et al.,

*Respondent*.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Allyn R. Sielaff, et al., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, which affirmed the decision of the United States District Court for the North District of Illinois, Eastern Division.

## OPINIONS BELOW

The order of the Court of Appeals is unpublished, and a copy of it is attached as "Appendix "A". The order of the Court of Appeals denying a petition for rehearing and suggestion for rehearing *en banc* is attached as Appendix "B". The memorandum decision of the District Court, reported as 443 F. Supp. 389 (1978), is attached as Appendix "C".

## JURISDICTION

The order of the Court of Appeals denying the petition for rehearing was entered on December 5, 1978. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

## QUESTION PRESENTED

Was it an abuse of discretion to find that plaintiffs were the prevailing party and to award attorney's fees under the Civil Rights Attorneys Fees Awards Act of 1976 for the entry of a consent decree in which plaintiffs did not receive any of the relief prayed for, and where the relief they did obtain, as the trial court found, was not required by the United States Constitution?



## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment to the United States Constitution: "The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated. . . ."

42 U.S.C. § 1988: "In any action or proceeding to enforce a provision of . . . [42 U.S.C. § 1983] . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."

## STATEMENT OF THE CASE

On November 15, 1973, Samuel Drew filed a *pro se* complaint alleging violations of his Fourth Amendment rights and 42 U.S.C. § 1983 while he was a prisoner at Stateville Correctional Center in Illinois. He alleged that during a search of his cell, legal documents and personal correspondence were destroyed and a radio, wristwatch, and art supplies were seized by defendants. Plaintiff asked for the return of his personal property, monetary damages, the right to be present during all future cell searches, and a declaratory judgment. Counsel was appointed to represent Drew, and an amended complaint was subsequently filed which sought the same relief for all residents and former residents at Stateville who have been or may be subjected to violations of their Fourth Amendment rights.

The action was settled by the entry of a Settlement Order (Appendix "D") which stated that nothing in the order constituted an admission by defendants as to the facts alleged in the amended complaint; that even assuming the facts alleged by the plaintiffs to be true, the Court would find the current Administrative Regulation, if enforced, was adequate to prevent the types of abuses alleged by plaintiffs; that defendants were enjoined to observe and enforce their Administrative Regulation and the Fourth Amendment rights of plaintiffs; and that each resident whose cell is searched is to be provided with the date, time, and identity of each officer participating in the search and a list of any property seized during the search.

Depositions of four defendants indicated that written records were kept as to the date, time, and officers involved in each cell search, and that the resident was not given a copy of the record unless contraband was seized



from the cell. This method of notice to the resident regarding the confiscation of property reflected the administrative regulation then in force.

Counsel for plaintiffs filed a petition for attorney's fees and costs requesting $18,191.25 (computed at $75 per hour) in attorney's fees and $183.21 in costs. Defendants filed a memorandum in opposition. The District Court (Appendix "C") found that the consented-to relief of giving a resident written notice of a cell search, as opposed to merely giving written notice of a seizure, was substantial and that plaintiffs were the prevailing party in the lawsuit. The Court awarded $7,900 in fees and excluded compensation for the time in which counsel was associated with a law firm which had a reputation for not seeking or accepting awards of attorney's fees in cases of this type.

The Court of Appeals for the Seventh Circuit affirmed the District Court decision in an unpublished order (Appendix "A") and it denied a petition for rehearing (Appendix "B".) Plaintiffs' counsel then filed a verified bill of costs for $5,670.76 to cover costs and attorney's fees for appellate work.

## REASONS FOR GRANTING THE WRIT

### I.

### AN AWARD OF FEES UNDER THE CIVIL RIGHTS ATTORNEYS FEES ACT OF 1976 IS NOT PROPER UNLESS PLAINTIFF PREVAILS ON A CONSTITUTIONAL ISSUE.

The Court of Appeals decided that, because plaintiff class in a civil rights action gained "matters of substance" in a consent decree, the trial court could, in its discretion, treat them as a prevailing party under the new statute and award $7,900.00 in attorney's fees plus expenses. It is undisputed that plaintiffs did not obtain any of the relief originally prayed for, and the relief they did obtain, as the trial court noted, was not required by the Constitution. The award of attorney's fees for relief which is not of constitutional magnitude is unwarranted, *Nadeau* v. *Helgemoe,* 581 F. 2d 275 (1st Cir. 1978).

The decision by the Court of Appeals will encourage the filing of both meritless and *de minimus* lawsuits on behalf of prisoners; it will raise the cost of settlement in *every* prisoner case by $8,000 (or by $13,800 if fees and costs for litigating the appeal are allowed); and it will force the Department of Corrections to obtain a *judicial* determination of the constitutionality of all attacks upon its Administrative Regulations.

The parties agreed to the entry of a Settlement Order in which the Department of Corrections was enjoined to observe and enforce the rights of inmates as guaranteed under the Fourth Amendment and the Department's Administrative Regulations. This is an acknowledgment of a pre-existing duty which the Department will, and must,



agree to at any time. This does not resolve an issue of constitutional law. Absent a finding by the Court that these rights were not observed and enforced in the past, and the Court did not enter such a finding, this portion of a settlement agreement should not be used as a basis for the award of attorney fees. If such an agreement is the basis for the award of fees, and this is one of two assumptions which must be drawn from the Panel's decision, the Department of Corrections will be forced to seek a *judicial* determination of all attacks on past practices rather than to resolve lawsuits through negotiation and a consent decree.

The second assumption implicit in the Panel's decision is that the modification of an Administrative Regulation, despite a finding by the trial court that the modification is not a constitutional requirement, is a basis for the award of attorney's fees. The parties did not dispute the fact that every time contraband was *seized* from an inmate's cell, he was given written notice of the seizure pursuant to Administrative Rule 401. The Settlement Order provided for a modification of this Regulation so that each time a cell was *searched,* the inmates were to be given written notice of the date, time and identity of the officers who conducted the search. This Petitioner argues that absent a finding that the Fourth Amendment is violated by the failure to give inmates written notice after a cell search, plaintiffs have not prevailed and their attorney is not entitled to an award of fees. The District Court is unable to make such a finding because the Final Settlement Order expressly states:

> This Court finds, with the consent and agreement of the parties herein, that even assuming the facts alleged by plaintiff to be true, which this Court does here-

> by assume for purposes of this order, that *the Court would nevertheless find the Administrative Regulation 401, if enforced, is adequate to protect the types of abuses alleged by the plaintiff as described above.* (emphasis added)

The Panel's decision failed to consider the First Circuit's unassailable opinion on this issue. "If it has been judicially determined that defandants' conduct, however beneficial it may be to plaintiffs' interests, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense." *Nadeau* v. *Helgemoe,* 581 F. 2d at 281. The conclusion which the Panel should have drawn is that the subsequent change in the Administrative Regulation was a gratuitous act by defendants and that plaintiffs did not prevail in a legal sense.

## II.

## PLAINTIFFS DID NOT "PREVAIL" OVER DEFENDANTS WITHIN THE MEANING OF THE STATUTE.

Plaintiffs sought the following relief in their complaint: the return of personal property, money damages, the right to be present during all cell searches, and declaratory relief. Plaintiffs did not attain any of the relief requested. In their negotiations, defendants were successful on each of these points. The only change required of them was to give each inmate written notice after his cell had been searched. This change was of negligible importance because the information was already maintained and available and the defendants' right to search a cell in the absence of the inmate remained unqualified. (Written notice was already given after a seizure of contraband, and four correctional officers stated in depositions that written records were



maintained as to each cell search. By not requiring the residents to be present during the search of a cell, the search does not have to be scheduled around the work assignment and out-of-cell activities of the inmates and it avoids unnecessary confrontation between staff and inmates on a matter which could quickly became very personal.)

In an abstract sense, the right to be informed in writing of the date, time, and identity of persons who searched a cell is a reasonable and practical alternative to allowing an inmate to be present during the search of his cell and, thus, may be considered an advancement in human rights. In the context of the adversary setting in which this lawsuit was litigated, the right is *de minimus.* After comparing the relief sought by the plaintiffs, the defendants' denial of any entitlement to that relief, and the ultimate resolution of the controversy, it was an abuse of discretion to find that plaintiffs "prevailed" over defendants. Nonetheless, counsel was awarded $7,900 in attorneys' fees (or $13,800 if fees and costs for litigating the appeal are allowed) under a statute which requires that one party "prevail" over the other.

## III.

## PLAINTIFFS WAIVED THEIR RIGHT TO AN AWARD OF FEES BY FAILING TO NEGOTIATE THE ISSUE WITH DEFENDANTS.

Basic notions of fairness indicate that it was an abuse of discretion for the trial court to interfere and materially alter an agreement reached between the parties. The Settlement Order did not provide for attorney's fees, and this case would not have been settled if a demand for fees had

been made during negotiations. Defendants were under the impression that plaintiffs' counsel was rendering services *pro bono*. The trial partially shared this impression because it denied the request for fees for the time period in which counsel was employed by Schiff, Hardin and Waite. At the time counsel left the employment of the law firm and went into private practice in January, 1976 the fact that legal services were no longer performed *pro bono* was never mentioned and, under the prevailing law, any expectation of fees was unwarranted. *Alyeska Pipeline Service Co.* v. *The Wilderness Society,* 421 U.S. 240 (1975).

The Panel's decision overlooked this argument, and it did not reconcile its opinion with the case law which has dealt with the issue. Even when a statute provides for the payment of attorney's fees, the parties are held to the agreement they reached through negotiation, and the court will not award attorney's fees if the parties did not include it in their agreement. *Cruz* v. *Pacific American Insurance Corp.,* 337 F. 2d 746 (9th Cir. 1964); *Gamlen Chemical Co.* v. *Dacar Chemical Products Co.,* 5 F.R.D. 215 (W.D. Pa. 1946). It is significant to note that in both *Cruz* and *Gamlen,* unlike this case, there was no doubt but that plaintiff was the prevailing party.

## IV.

## THE AMOUNT OF FEES AWARDED WAS UNREASONABLE BECAUSE IT WAS NOT PROPORTIONATE TO THE EXTENT TO WHICH PLAINTIFF PREVAILED.

The trial court's award of fees was based upon all of the time expended on the litigation while counsel was in private practice. Every circuit which has considered the issue agrees



that an award of attorneys fees should be proportionate to the relative success of the litigation. *Batiste* v. *Furnco Construction Corp.,* 503 F. 2d 447 (7th Cir. 1974), *cert. den.,* 420 U.S. 928 (1975); *Nadeau* v. *Helgemoe, supra; Pearson* v. *Electric Co.,* 542 F. 2d 1150 (10th Cir. 1976); *Morton* v. *Charles County Board of Education,* 373 F. Supp. 394 (D. Md. 1974) *aff'd* 520 F. 2d 871 (4th Cir. 1974), *cert. denied,* 423 U.S. 1034 (1975); *Shaeffer* v. *San Diego Cabs, Inc.,* 462 F. 2d 1002 (9th Cir. 1972) and *Marr* v. *Rife,* 545 F. 2d 554 (6th Cir. 1974).

> ". . . an award of attorney's fees can only be made to a prevailing party and as a general guideline the amount of the award should be proportionate to the extent the party has prevailed in the suit. *Batiste, supra* at 451.

The argument has already been stated that plaintiffs did not prevail with respect to the claims raised in the complaint—declaratory relief, return of personal property, money damages and the right to be present during a cell search—and that the relief obtained, written notice of the fact that a cell was searched, is not of constitutional magnitude. In light of the plaintiffs' relative success, or failure, in this litigation, the lower court should not have awarded any attorney's fees.

If plaintiffs had prevailed on all issues raised in the complaint, the calculation of the amount of fees would undoubtedly have been the same—number of hours worked times the hourly rate. The award of $7,900.00 in attorney's fees is unreasonable and clearly erroneous.

If this Court does not agree that the lower court opinion should be reversed, then this case should be remanded for further proceedings to determine the extent to which plain-

tiffs were the prevailing party. As a part of the determination, the lower court should bear in mind the standard by which defendants are entitled to attorney's fees. The standard, enunciated in *Christianburg Garment Co.* v. *E.E.O.C.*, —— U.S. ——, 98 S. Ct. 694, 46 L.W. 4105 (1978) and applied to cases decided under the Civil Rights Attorney's Fees Awards Act in *Nadeau* v. *Helgemoe, supra,* is whether the litigation of any of plaintiffs' claims was "frivolous, unreasonable or groundless, or that plaintiff continued to litigate after it clearly became so." 98 S. Ct. at 701. Clearly plaintiffs' inability to obtain any of the relief prayed for in either their original or amended complaint should entitle defendants to present their position to the lower court. (Both *Christianburg* and *Nadeau* were decided after defendants submitted their Memorandum in Opposition to Plaintiffs' Petition for Attorney's Fees and Costs).

## V.

## THE DISTRICT COURT SHOULD NOT AWARD THE PAYMENT OF EXPENSES WHICH ARE NOT PROVIDED FOR BY STATUTE.

Taxable costs may only include those items authorized by statute, *Alyeska Pipeline Service Co.* v. *The Wilderness Society, supra,* and there exists no statutory right to the payment of out-of-pocket expenses in an award of fees. *Keyes* v. *School District No. 1,* 439 F. Supp. 393 (N.D. Cal. 1977). All of the "costs" claimed by plaintiffs-appellees are out-of-pocket expenses which are not provided for by 28 U.S.C. § 1920. One exception is the cost for duplication of papers and an award of this cost is purely discretionary, assuming that one of the parties prevailed.



## CONCLUSION

For the reasons stated above, it is respectfully requested that the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit be granted.

Respectfully submitted,

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**APPENDIX "A"**

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Unpublished Order Not To Be Cited Per Circuit Rule 35
(Argued October 25, 1978)
October 25, 1978
Before

Hon. THOMAS E. FAIRCHILD, Chief Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. WILBUR F. PELL, JR., Circuit Judge

SAMUEL DREW, et al.,
*Plaintiffs-Appellees,*

vs.

No. 78-1281
ALLYN R. SIELAFF, et al.,
*Defendants-Appellants.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 73-C-2911
Prentice H. Marshall, *Judge.*

**ORDER**

The Court, having read the briefs, addressed itself to the record, and heard oral arguments by counsel on behalf of the appellants, announced in open court that the judgment appealed from is AFFIRMED.

Appellants have conceded two points addressed in their opening briefs by reason of the Supreme Court's decision in *Hutto* v. *Finney*, 46 U.S.L.W. 4817 (June 23, 1978). With respect to appellants' remaining points, it appears that plaintiffs gained matters of substance through the consent decree, even though they did not receive types of relief originally prayed for. It was within the court's discretion to treat plaintiffs as prevailing under Civil Rights Attorney's Fees Awards Act of 1976. Inclusion, along with the attorney fees, of certain expenses incurred as incidents of services rendered by counsel is reasonable.

According, the Clerk of this Court is directed to enter judgment AFFIRMING the judgment appealed from.



**APPENDIX "B"**

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
December 5, 1978
Before
Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge

SAMUEL DREW, et al.,
*Plaintiffs-Appellees,*

vs.

No. 78-1281
ALLYN R. SIELAFF, et al.,
*Defendants-Appellants.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 73-C-2911 Prentice H. Marshall, *Judge.*

**ORDER**

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by defendants-appellants, no judge in regular active service has requested a vote thereon, and all of the judges on the original panel have voted to DENY a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

## APPENDIX "C"

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SAMUEL DREW, individually and on behalf of all other persons similarly situated,
*Plaintiffs,*

v.

ALLYN R. SIELAFF, et al.,
*Defendants.*

No. 73 C 2911

### MEMORANDUM DECISION

Plaintiff Samuel Drew is a resident of the Illinois Correctional Institution at Stateville, Illinois. He commenced this action *pro se* alleging violations of his Fourth Amendment rights and 42 U.S.C. § 1983. Jurisdiction is here under 28 U.S.C. § 1343. We appointed Ms. Martha M. Jenkins of the Chicago bar to represent Drew. An amended complaint was filed in which plaintiff sought relief for a class of all residents and former residents of Stateville who have been subjected, continue to be subjected or may be subjected in the future to searches of their cells by officers, employees or agents of the Illinois Department of Corrections in violation of their Fourth Amendment rights.

After extensive pre-trial preparation and negotiation, the action was settled by the entry of a consent decree on April 22, 1977, in which defendants and their successors were enjoined to observe and enforce the rights of residents

under the Fourth Amendments, to observe and strictly enforce the provisions of Administrative Regulation 401 of the Department of Corrections and to provide each resident whose cell is searched, the identity of each officer participating in the search and a list of any items seized as a result of the search. The consent decree also required that it be conspicuously posted at Stateville.

Ms. Jenkins has now petitioned for an award of attorneys' fees. Defendants do not challenge our authority to make such an award under the Civil Rights Attorney's Fees Awards Act of 1976, P.L. 94-559. *Bond* v. *Stanton*, 555 F. 2d 172 (7th Cir. 1977); *Finney* v. *Hutto*, 548 F. 2d 740 (8th Cir. 1977). Rather defendants assert the plaintiff class was not a prevailing party under the Attorney's Fees Act; the relief obtained was *de minimus;* in our discretion we should not divert funds needed for prison rehabilitation to the award of attorneys' fees; and in any event Ms. Jenkins should not be compensated at the rate she requests ($75 per hour) nor should she be compensated for the time she devoted to the matter while she was associated in the practice with the firm of Schiff Hardin & Waite.

We find that the plaintiff class was a prevailing party. True the consent decree did not find nor did defendants concede the constitutional violations alleged by plaintiff. But it is undisputed that a controversy existed over how cells of residents can be searched consistent with the Fourth Amendment and the Department of Corrections Administrative Regulation 401. Plaintiff sought a decree that a resident must be present when his cell is searched. In settlement negotiations which were conducted in our presensce, it emerged that the request was impracticable in certain situations. Emergencies arise which must be dealt with



immediately. Considerations of safety for staff and residents may dictate the search of a cell in the absence of its resident.

However, the practice and procedure which obtained prior to the entry of the consent decree did not give a resident any notice that his cell had been searched unless contraband was seized. Nor was he advised of the identity of the staff who searched the cell. Thus, a resident who believed himself the victim of an unreasonable search and perhaps the seizure and confiscation of non-contraband had no sure way of ascertaining when the search occurred or what staff members had been participants in it. In these circumstances, he was virtually helpless to seek any relief from an unlawful search.

These shortcomings in defendants' practice and procedure were remedied by the decree. Detailed post-search notice is now required. The resident will now know the time of any search of his cell and the persons against whom he should complain if he is of the belief that the search or its consequences were unlawful.

We find that this consented-to relief is substantial. Furthermore, we infer from the absence of any objections to the consent decree by members of the plaintiff class that the residents of Stateville regard the decree as providing them with substantial relief. Accordingly, we find that the plaintiff class was a prevailing party.

Nor can the relief obtained be characterized as *de minimus*. Defendants now suggest that the new notice practice imposed by the decree was in existence prior to the decree. But those facts were not disclosed in settlement negotiations conducted in our presence and in our chambers. All that existed prior to the decree was notice of seizure.

Notice of search qua search was not served upon the resident, nor was he advised as to the participants of the search. The post-search notice described by the decree was a reasonable substitute for resident presence at all searches. While the remedy was a simple one, it was not a minimal advance in the preservation of those Fourth Amendment rights which residents of correctional institutions enjoy. It was a substantial step toward the preservation of those rights.

We know from our handling of this case and other cases pending before us dealing with the conditions at the Stateville Correctional Facility that the Illinois Department of Corrections has substantial budgetary problems. We also recognize that residents of correctional institutions initiate many civil rights actions against the administrators of those institutions complaining of alleged violations of constitutional rights. Some of those actions are frivolous. Others, such as this one, appear to be meritorious. While the benefits conferred by the Civil Rights Attorney's Fees Awards Act of 1976 should not be a windfall for the bar, neither should the bar be expected to prosecute an action which results in substantial relief for the plaintiff class without compensation merely because defendants such as those in the case at bar have budgetary problems and are faced with large numbers of frivolous actions. In the circumstances of this case, just as in any other case where attorney's fees are an appropriate portion of the remedy granted, each case should turn on its own merits and awards should be made which are fair and equitable under all of the circumstances.

Ms. Jenkins is a lawyer of extraordinary ability. She has had extensive experience in all types of litigation in-



cluding civil rights litigation. Today she is enaged in the individual private practice. However, during a portion of her representation of the plaintiff class she was associated with the Chicago firm of Schiff Hardin & Waite. It is our understanding from other civil rights litigation which we have heard in which members or associates of that firm represented prevailing parties that the firm does not seek or accept awards of attorney's fees in cases of this type. Accordingly, as defendants urge we have excluded from our consideration the 137.25 hours which Ms. Jenkins devoted to this action while she was associated with Schiff Hardin & Waite.

The materials which she has presented in support of her fee petition demonstrate that she worked assiduously on this matter. She took six depositions. She interviewed over sixty residents and staff members of Stateville. She conducted a survey by mail of the departments of corrections of all fifty states to ascertain how they handled cell searches. That mail survey was followed up by extensive telephone interviews with supervisory personnel of many of the departments of corrections. She submitted briefs of high quality in behalf of her clients. She readied the case for trial and put herself and her clients in the strongest possible position for negotiation of a settlement. Had the case not been settled, she was ready to proceed to an adversary trial which would have been lengthy and complex.

Her detailed time records throughout her engagement show that she has devoted only 242.5 hours of time to this case. Of that, 137.5 hours occurred while she was with Schiff Hardin & Waite. The remaining 105.25 have been devoted since she entered the individual private practice. We think this time expenditure to be exceptionally reason-

able. It demonstrates an exceptionally efficient utilization of time.

Ms. Jenkins asks for an award at the rate of $75 per hour which she represents to be her current charging rate. That is a reasonable rate for a lawyer of her outstanding background and experience. Its reasonableness is enhanced in our judgment by the modest amount of time which she has reported in respect to this engagement.

Accordingly, we have concluded that Ms. Jenkins is entitled to be compensated at her regular hourly rate of $75 per hour for the 105.25 hours of time which she has devoted to this engagement since entering the individual private practice. In addition, she is entitled to recover her out-of-pocket expenses totalling $183.21 which she has itemized. In respect to the latter item, we note that certain of those expenses were incurred while she was associated with Schiff Hardin & Waite. We would expect that she would reimburse that firm for those expenses.

Accordingly, it is ordered and adjudged that Martha M. Jenkins, attorney for plaintiff Samuel Drew and the plaintiff class, have and recover from defendants attorney's fees in the amount of $7,900.00 and out-of-pocket expenses in the amount of $183.21, for a total of $8,083.21.

ENTER:

*/s/ Judge Prentice H. Marshall*

DATED: January 16, 1978.

No. 73 C 2911



## APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SAMUEL DREW,
*Plaintiff,*

vs.

ALLYN R. SIELAFF, et al.,
*Defendants.*

No. 73 C 2911

## FINAL SETTLEMENT ORDER

The plaintiff in this proceeding has alleged that when cell searches are conducted at the Stateville Branch of the Illinois Department of Corrections, that frequent abuses occur, in particular:

(a) Destruction of personal and legal property;

(b) Unnecessary confiscation, theft or disappearance of personal property for which a resident has a permit or is otherwise entitled under the rules, regulations and administrative bulletins of the Illinois Department of Corrections to possession; and

(c) Leaving the cell in a substantially worse condition than it was found.

Nothing in this order shall constitute an admission by the defendants of any of the facts alleged in the Second Amended Complaint, or that the facts therein stated are sufficient to state a claim for relief.

This Court finds, with the consent and agreement of the plaintiff and defendants herein, that even assuming the facts alleged by the plaintiff to be true, which the Court does hereby assume for purposes of this order, that the Court would nevertheless find the Administrative Regulation 401, if enforced, is adequate to prevent the types of abuses alleged by the plaintiff as described above.

Therefore, by agreement of the parties, this Court orders that the Illinois Department of Corrections by and through its officers, employees and agents, be enjoined to observe and enforce the rights of residents under the Fourth Amendment to the United States Constitution as those rights may be from time to time be defined by the courts of this jurisdiction, but, for the purposes of this order, not retroactively, and to observe and strictly enforce the provisions of Administrative Regulation 401.

The Illinois Department of Corrections shall further amend its regulation to provide that, in every instance in which a resident's cell is searched, a form shall be filled out indicating the date and time of search and the identity of each officer participating in the search, together with a list of property confiscated, if any. A copy of such report shall be given, in every instance, to the resident within a reasonable time after the search. It is recommended that the remedy for individual instances of cell search abuse should be through the Illinois Department of Corrections' grievance or claims procedure and through the Illinois Court of Claims. Inadvertant or isolated deviations from Administrative Regulation 401 shall not be deemed contemptuous violation of this order, provided, however, that frequent and widespread abuse of this order may be brought to the attention of this Court.



IT IS FURTHER ORDERED that a copy of this order shall be conspicuously posted at the Stateville Branch of the Illinois Department of Corrections and that the contents of this order shall be communicated to each and every employee or agent of the Illinois Department of Corrections who may have occasion to conduct or participate in cell searches.

ENTERED this 22nd day of April, 1977.

Supreme Court, U. S.
FILED
APR 16 1979
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978.

**No. 78-1111**

ALLYN R. SIELAFF, ET. AL.,

*Petitioners,*

*vs.*

SAMUEL DREW, ET AL.,

*Respondents.*

## RESPONSE TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES
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Respondents.

# RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents, Samuel Drew, et al., respectfully pray that this Court deny the request of petitioners for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

## OPINONS BELOW

The opinions below are attached as appendices A through C to the petition for a writ of certiorari filed by petitioners herein.



## JURISDICTION

Respondents concede the jurisdiction of this Court pursuant to 28 U.S.C. §1254(b) to consider the petition for a writ of certiorari filed by petitioners herein.

## QUESTION PRESENTED

The only question presented to this Court based on the record and raised in the district court is: Whether the Seventh Circuit Court of Appeals erred in failing to reverse the district court's finding that plaintiffs-respondents were "prevailing parties" within the meaning of the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988, on the grounds that such a finding was a clear abuse of discretion.



## STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1988 is set forth in petitioners' petition page 3.

28 U.S.C. §1920 states:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under §1923 of this title.
>
> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

STATEMENT OF THE CASE

This is a suit on behalf of the respondent and a class of all residents and former residents of the Stateville Branch of the Illinois Penitentiary who have been subjected, continue to be subjected, or may be subjected in the future to searches of their cells by officers, employees or agents of the Illinois Department of Corrections. The suit sought to put a halt to certain abuses of the cell-search process, and to prevent such abuses in the future, in particular: (a) destruction of personal and legal property during the conduct of the cell search; (b) confiscation, theft or disappearance of personal property for which a resident has a permit or is otherwise entitled under the rules, regulations, and administrative bulletins of the Illinois Department



of Corrections to possession; and (c) leaving the cell in a substantially worse condition than that in which it was found. A copy of the Second Amended Complaint is attached hereto as Appendix A.

The case was fully prepared to go to trial, at which time respondents were prepared to prove the allegations of their complaint, to prove substantial violations of Fourth Amendment rights, including the complete and total nonenforcement of the then Administrative Regulation 401. Instead of proceeding to trial, the parties, after lengthy negotiations with and without the help of the district court, reached a settlement. Under the terms of the settlement order, which is attached to the petition as Appendix D, petitioners are "enjoined to observe and enforce the rights of

residents under the Fourth Amendment to the United States Constitution" and "to observe and strictly enforce the provisions of administrative regulation 401." The settlement order also provided for communication of its terms widely and repeatedly to residents and those persons connected with the Illinois Department of Corrections who participate in searches. In addition, administrative regulation 401 was to be amended to provide that every resident, in every instance of a search, would receive information indicating the date and time of search, and the identity of each officer participating in the search, together with a list of property confiscated, if any.

Prior to the settlement order, only a resident whose property was actually



confiscated would receive a notice of the search in the form of a ticket for contraband. The resident would not necessarily receive notice of the identity of any of the participants in the search. The lack of reporting requirements made it extremely difficult for any resident aggrieved by a cell-search to go to the Illinois Court of Claims, a more suitable forum for resolution of many cell-search disputes than a federal court under the federal civil rights laws.

The final settlement order was entered by the district court on April 22, 1977. A copy of the transcript of the entry of that order is attached hereto as Appendix B. Pursuant to previous negotiations and the agreement and representations of counsel at the entry of the final settlment order, a petition

for attorneys' fees and costs was filed in the district court on May 19, 1977, and contested by petitioners.

The only issue raised in the district court was whether respondents were "prevailing parties," an issue which the district court, being familiar with the litigation, resolved in favor of respondents. A copy of the petitioners' memorandum in opposition to the petition for fees in the district court is attached hereto as Appendix C.

Counsel for the petitioners, who had been counsel all throughout the case, left the office of the Attorney General of the State of Illinois after all proceedings in the district court were resolved; substitute counsel for the State of Illinois appealed to the Seventh Circuit Court of Appeals and subsequently filed the petition for certiorari herein.



In the Seventh Circuit Court of Appeals, counsel for petitioners raised four issues in the brief-in-chief:

> I. Whether the 11th Amendment bars the award of attorneys' fees to be recovered from State funds in actions under 42 U.S.C. §1983.
>
> II. Whether the award of out-of-pocket expenses should be denied because not authorized by statute.
>
> III. Whether the Civil Rights Attorneys' Fees Awards Act of 1976 should be retroactively applied.
>
> IV. Whether a plaintiff is a "prevailing party" under the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988, where no relief is sought in either an original or amended complaint pursuant to a final settlement order entered in the case.

The issues in I and III were subsequently conceded due to this

Court's decision in Hutto v. Finney, U.S. , 98 S.Ct. 2565 (1978). Issue II was raised for the first time on appeal, but was considered and decided by the Seventh Circuit Court of Appeals. Issue IV was properly before the lower appellate court.

Respondents filed a brief in the Seventh Circuit, and petitioners filed a reply brief. Petitioners were subsequently granted leave to file a supplemental reply brief over the objection of respondents. That brief raised two arguments which not only were never raised in the district court, but also were not even raised in respondents' brief-in-chief. These were (1) the question of attorneys' fees should have been specifically raised in the settlement agreement itself and counsel for petitioners in the district court was "surprised"



by respondents' request for attorneys' fees; (2) the case should be remanded for a finding that attorneys' fees should be awarded proportionately to the extent the parties prevailed and that the case should be remanded to the district court for "proportionality" findings. These points being raised in the supplemental reply brief, were never responded to in writing by counsel for respondents.

The case was orally argued before a panel of the Seventh Circuit Court of Appeals on October 25, 1978. Argument was given by counsel for petitioners. The Seventh Circuit Court of Appeals ruled against petitioners without hearing oral argument by counsel for respondents. Therefore, counsel for respondents has never had an opportunity, in writing or by oral argument, to respond to some

of the issues and arguments raised by counsel for petitioners, including those raised in this Court. With the exception of petitioners' argument that respondents are not prevailing parties because different relief from that sought in the original or amended complaint was obtained, respondents would submit, if they ever had the opportunity, that the arguments by petitioners were never presented to the district court, are based upon matters which are not of record in this case, and are in some cases based on matters which are not factually correct.

The only issue which is properly before this Court because it was raised in the district court, and was preserved on appeal, and is based on matters within the record, is whether the district court abused its discretion in finding



that respondents were "prevailing parties."

## REASONS FOR DENYING THE WRIT

### I.

### None Of The Criteria For Granting A Writ Of Certiorari Pursuant To Rule 19 Of The Rules Of The Supreme Court Are Present In This Case

Petitioners' petition does not address, nor are there, any of the considerations governing review on certiorari as set forth in Rule 19 of the Rules of the Supreme Court. There is no decision rendered by the Seventh Circuit Court of Appeals in conflict with the decision of another court of appeals on the same matter. There is no important question of federal law which has not been, but should be, settled by this Court. The Seventh Circuit has not decided a federal question in conflict with applicable decisions of this Court,

or so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned the departure by the lower court, as to call for an exercise of this Court's power of supervision. Nowhere in the petition filed by petitioners herein do they make any argument that the case falls within those guidelines. The argument in the petition is solely directed to the substantive merits of the case. Respondents consider those merits minimal at best. Since this Court has directed a response to the petition, respondents will address the arguments made by petitioners.

II.

The Question Whether An Award Of Attorneys' Fees Under The Civil Rights Attorneys' Fees Awards Act Of 1976 Is Not Proper Unless Respondent Prevails On A Constitutional Issue Is Not Properly Before This Court



The "constitutional issue" argument was never raised in the district court. The argument was similarly not raised in the brief-in-chief in the Seventh Circuit Court of Appeals.

Even if, for some reason, this Court considered the issue properly before it, it lacks merit. As nearly as respondents understand the argument set forth at pages 6 through 8 of the petition for a writ of certiorari, it begins with the premise:

> ...the relief they [respondents] did obtain, as the trial court noted, was not required by the Constitution.

First, the premise is not factually correct. The trial court made no such finding, or even notation. The case was not tried, it was settled. The most the district court noted was in its order of January 16, 1978, ruling on

respondents' fee petition, and stating:

> We find that the plaintiff class was a prevailing party. True the consent decree did not find nor did defendants concede the constitutional violations alleged by plaintiffs. But it is undisputed that a controversy existed over how cells of residents can be searched consistent with the Fourth Amendment and the Department of Correction Administrative Regulation 401. (Emphasis added.) (See Exhibit C to petition for certiorari, page C2).

Petitioners' premise is followed by an in terrorum argument about cost to the state, which has no relation to the legal argument whatsoever.

Petitioners next appear to argue that since there was no "finding" of a constitutional violation (as there would not normally be in a settlement order), and that since petitioners were required



to comply with the Fourth Amendment in any event, that whatever the petitioners did in response to respondents' lawsuit was gratuitous. Respondents fail to see how the pre-existence of a duty exonerates petitioners who, respondents were prepared to show, violated the Fourth Amendment consistently and failed to enforce Administrative Regulation 401. Moreover, if an explicit finding of wrongdoing were necessary, settlements would be impossible to secure. Every case would be litigated.

Petitioners have conceded, as both the legislative history of the Civil Rights Attorneys' Fees Awards Act of 1976 and cases compel, that a party may be considered to have prevailed where rights are vindicated by consent

judgment. (See Seventh Circuit brief-in-chief, p. 19). While the relief obtained should be required by the constitution or by law, and not be gratuitious, where there is a settlement the test is whether the claim is not groundless or frivolous, a determination the trial court is in the best position to make. Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978); M.C.I. Concord Advisory Board v. Hull, 457 F. Supp. 11 (D. Mass. 1978).

Whether respondents were prevailing parties was an issue of fact, within the discretion of the district court. The district court exercised that discretion. The Seventh Circuit Court of Appeals on review found no abuse of that discretion. This Court should not consider the question.



## III.

### Respondents May Be Prevailing Parties Even Though Not Awarded The Relief Prayed For In This Complaint

To the extent that petitioners base their argument here on a theory that respondents did not prevail because the relief they obtained differed from that prayed for in their complaint, the argument totally lacks merit. It flies in the face of the Federal Rules of Civil Procedure. Neither Rule 8 nor Rule 54 limits a party to the relief requested. Rule 54(c) specifically provides:

> Except as to a party against whom judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

Should relief be granted which was not

requested, formal amendment of the pleadings is not even required. International Nikoh Corp. v. H.K. Porter Co., 358 F.2d 284 (7th Cir. 1966). Cf. Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971).

IV.

The District Court Did Not Clearly Abuse Its Discretion In Finding That Respondents Prevailed Over Petitioners Within The Meaning Of The Civil Rights Attorneys' Fees Awards Act Of 1976

As to the relief obtained, the district court found:

> We find that this consented-to relief is substantial. Furthermore, we infer from the absence of any objections to the consent decree by members of the plaintiff class that the residents of Stateville regarded the decree as providing them with substantial relief....
>
> Nor can the relief obtained be characterized as de minimus. Defendants now suggest that the new notice practice imposed by the decree was in existence prior to the decree. But those facts were not disclosed in settlement negotiations conducted in our presence and in our chambers. All that existed prior to the decree was notice of seizure. Notice of search qua search was not served upon the resident, nor was he advised as to the participants of the search. The post-search notice described by the decree was a reasonable substitute for resident presence at all searches. While the remedy was a simple one, it was not a minimal advance in the preservation of those Fourth Amendment Rights which residents of correctional institutions enjoy. It was a substantial step toward the preservation of those rights.



What respondents obtained was an enforceable decree that the petitioners (1) would live up to their responsibilities under the Fourth Amendment; (2) would enforce Administrative Regulation 401;

(3) would conspiciously post the settlement order, and communicate it to each and every employee of the Illinois Department of Corrections who may have occasion to conduct and participate in cell searches, and (4) would provide every resident whose cell was searched with a notice of the search identifying all participants. The latter requirement will make it possible for a resident to file a claim in the Court of Claims of Illinois if property is wrongfully taken or destroyed or if there has been other abuse.

To find that respondents are prevailing parties was not an abuse by the district court. The finding was affirmed by the Seventh Circuit. This Court should not accept certiorari in a case involving solely a factual question of abuse of



discretion when what has been done below is shocking to the conscience. Certainly, this cannot be within that category.

V.

This Court May Not Consider The Issue Whether Respondents Waived The Right To An Award Of Fees By "Failing To Negotiate The Issue With Defendants [Petitioners]"

This issue was never raised in the district court. Such an assumed fact does not exist of record. Moreover, it is simply not true. Certainly counsel in the district court would best have known whether he was "surprised" by respondents' request for attorneys' fees. See the transcript attached hereto as Exhibit C:

> Ms. Jenkins [Mills]:
>
> . . .
>
> There is only one thing left in the case, and that is that in the proposed

> settlement order, the parties agree and it's understood that I would file, after entry, -- if the order was entered of the final settlement order, a petition for attorneys' fees. That doesn't mean Mr. McKoski wouldn't object to it, but we did agree that I file one. (App. C. p. )

Not only was the issue not raised in the district court, but also it was not even raised in the Seventh Circuit Court of Appeals until petitioners' supplemental reply brief, a brief to which petitioners have never had the opportunity to respond, either orally or in writing. This Court should not consider this argument of petitioners.

VI.

## This Court Ought Not To Consider The Issue Whether The Amount Of Fees Awarded Was Unreasonable Because It Was Not Proportionate To The Extent To Which Plaintiff Prevailed Because It Was Never Raised In The District Court



The proportionality argument was never raised in the district court. It was similarly never raised in the Seventh Circuit Court of Appeals until petitioners' supplemental reply brief, to which respondents have never replied or had the opportunity to reply, either orally or in writing. Moreover, this is not a case with separable issues on which respondents might have prevailed, and it is clear from the district court's opinion that it considered the totality of respondents' claims and the substance of the relief awarded. Finally, it is clear that this is a factual issue of abuse of discretion which this Court should not consider.

VII.

This Court Should Not Consider The Question Whether The Payment Of Expenses Which Are Not Even Enumerated Specifically In 28 U.S.C. §1920 Was Proper, Because It Was A Clear Abuse Of The Discretion Of The District Court Because The Issue Was Never Raised In The District Court

The question of the propriety of awarding out-of-pocket expenses was never raised in the district court. Therefore, it should not be considered on appeal. It was considered, however, by the Court of Appeals which affirmed the district court.

In the alternative, the law is clear that the award made by the district court was well within its discretion. Federal Rule of Civil Proceudre 54(c) provides for a discretionary award of costs. Title 28 U.S.C. §1920 enumerates some of



the costs awardable. It is by its language permissive -- the court "may tax" the enumerated items as well as others as costs. The costs in this case were $183.21 for copying, postage, telephone and travel. There is a growing body of decisional authority for the discretionary award of costs other than those set forth in §1920. See, e.g., Pennsylvania v. O'Neill, 431 F. Supp. 700 (E.D. Pa. 1977). In Hodge v. Seiler, 558 F.2d 284 (5th Cir. 1977), the court stated in discussing costs other than those enumerated in §1920:

> This Court is not unaware of the strong policies which lie behind remedial civil rights legislation, and the need to ensure that those who defend their rights are not financially penalized. 558 F.2d at 287.

As the award of costs are within the sound discretion of the district court, it

should not be set aside unless it constitutes an abuse of power or a clear abuse of discretion. 10 Wright & Miller, Fed. Prac. & Proc. §2668.

CONCLUSION

For the above stated reaons, respondents respectfully request this Court to deny petitioners' petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Appendix A

SECOND AMENDED COMPLAINT

Jurisdiction

1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§1343, 2201 and 2202. The action is brought under 42 U.S.C. §§1983, 1985 and 1986, to redress the deprivation of rights, privileges and immunities secured to all persons within the jurisdiction of the United States by the Constitution of the United States under color of State Law and Regulation.

Parties

2. Plaintiff Samuel Drew is and was at all times relevant hereto a prisoner and ward to the Illinois Department of Corrections confined in cell house B of the Stateville Prison.

3. Defendant David H. Briarton is the Warden of the Stateville Penitentiary in Joliet, Illinois. His office is

located at the Stateville Branch of the Illinois State Penitentiary in Joliet, Illinois. He has responsibility for the supervision and management of the Stateville Branch of the Illinois State Penitentiary.

4. Defendant Robert J. Kapture is Assistant Warden of the Stateville Penitentiary in Joliet, Illinois. His office is located at the Stateville Branch of the Illinois State Penitentiary in Joliet, Illinois. He has responsibility for the management of prisoner's personal property and the issuance of permits therefor and he reports directly to defendant David H. Briarton.

5. Defendant M.B. Hall is the Chief Guard and a Captain of the Stateville Penitentiary in Joliet, Illinois. His office is located at the Stateville Branch of the Illinois State Penitentiary

in Joliet, Illinois. His office is located at the Stateville Branch of the Illinois State Penitentiary in Joliet, Illinois. He has responsibility for the supervision and management of the lower-ranking officers, for their respective assignments and for the conduct of his officers.

6. Defendant Lieutenant Fleming is a Lieutenant in the Stateville Penitentiary in Joliet, Illinois. His office is located in B House at the Stateville Branch of the Illinois State Penitentiary in Joliet, Illinois. He has responsibility for the supervision and management of officers who are assigned to cell house B; moreover, he reports directly to defendant M.B. Hall.

7. Defendant Officer Buffington was, at all times relevant hereto, a correctional



officer in the Stateville Penitentiary in Joliet, Illinois. He occasionally was assigned to work in cell house B by defendant M.B. Hall, and therefore, reports directly to defendant Fleming.

8. Defendant Officer McNeal was, at all times relevant hereto, a correctional officer in the Stateville Penitentiary in Joliet, Illinois. He occasionally was assigned to work in cell house B by defendant M.B. Hall, and therefore, reports directly to defendant Fleming.

9. Each defendant is sued individually and in his official capacity. At all times mentioned in this complaint each defendant acted under color of State Law. At all times mentioned in this complaint each defendant acted wilfully, maliciously and in conspiracy with each other defendant.

Class

10. The plaintiff described in paragraph 2 above brings this action on his own behalf and on behalf of all other persons similarly situated. The plaintiff class consists of all residents and former residents of the Stateville Branch of the Illinois Penitentiary who have been subjected, continue to be subjected, or may be subjected in the future to searches of their cells by officers, employees or agents of the Illinois Department of Corrections. As to this class, the class is so numerous that joinder of all members is impracticable, there are questions of law or fact common to the class, the claims of the representative party are typical of the claims of the class, and the representative party will fairly and adequately protect



protect the interests of the class. In addition, the defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Facts

11. Plaintiff was transferred to six (6) gallery, cell house B, on July 30, 1973, wherein he was, at all times relevant hereto, confined.

12. Subsequent to Plaintiff's placement in cell #641, six (6) gallery, B House, Segregation Safekeeping Unit, he was summoned from his cell on the 1st of August, 1973, to isolation unit for a hearing with regard to an infraction report.

13. Following a summary hearing and judgment by the Stateville Disciplinary

Committee in aforesaid isolation unit, plaintiff was sentenced to serve fifteen (15) days in isolation confinement, commencing on the 1st of August.

14. Plaintiff was in isolated confinement status from August 1st until August 14th, inclusively, during which time he was absent from his assigned cell on six gallery, B House.

15. While plaintiff was confined to isolation unit, on August 10th, Officer Buffington for some inexplicable reason of which plaintiff is currently unaware, undertook a thorough search of plaintiff's cell on six gallery, B House.

16. That on August 10th, the date of aforesaid search, no other cells on six gallery, B House were subjected to search. On information and belief, plaintiff's cell was indeed, arbitrarily



selected from 58 cells, during his absence therefrom, to be searched.

17. Since plaintiff was absent from his cell and therefore was unable to supervise the rifling of his legal papers, coupled with the fact that in the absence of plaintiff there existed no probable cause for this search, the search and shakedown of his personal property should have been deferred until plaintiff returned to his cell from isolation.

18. That on August 13, 1973, Officer Buffington, who was accompanied by Officer McNeal, arbitrarily and discriminatorily selected plaintiff's cell from among 58 cells, which were not searched, to shakedown. This search was conducted in the absence of plaintiff and was witnessed by Calvin Thompson and Malcolm Litte. (See Exhibits A and B)

19. As a consequence of this search on August 13, plaintiff's legal papers and documents were wantonly destroyed, being partially flushed in the bowl of the toilet stool in the cell. These legal documents included, inter alia, (1) Trial transcript, (2) oral argument, (3) complaint, declaration and supplmentary petitions, and (4) legal correspondence.

20. In addition to the preceding legal materials, plaintiff's Caravelle wristwatch and Panasonic Radio were seized from his cell. Moreover, one (1) bag of coffee was opened and contents thereof strewn all over plaintiff's cell, thereby staining plaintiff's personal letters. (See Exhibits A and B)

21. Officer Buffington was observed to be carrying upon his departure from



plaintiff's cell, plaintiff's art supplies and radio by Calvin Thompson and Malcolm Little. (See Exhibits A and B)

22. Upon plaintiff's release from isolation and return to his cell on six gallery, cell house B, on August 14, 1973, he queried Officers Buffington and McNeal as to the cell search, who by their own admission, admitted entering his cell and removing his personal property therefrom. (See Exhibits A, B, C and D)

23. To this very date, plaintiff has been unsuccessful in recovering his property or any reimbursement therefor, though he contacted the then Superintendent Joseph Cannon, Assistant Superintendent Louis Lence and Lieutenant Fleming with regard to the matter.

24. In fact, instead of eliciting official cooperation, he was advised to

file a claim in Court. (See Exhibits C and D)

Claims

25. The arbitrary and capricious search, together with the destruction of legal materials, of only the plaintiff's cell from among 58 cells and the seizure therefrom of personal property and all similar searches of other residents' cells in imposing a grievous loss of fundamental rights violated the rights of plaintiff and all other persons similarly situated under the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States in that, using the search of plaintiff's cell as an example:

a. A thorough search and shakedown of plaintiff's cell during his absence, which necessarily precluded plaintiff from preserving the integrity of his legal materials and insuring



that they were not read by the defendants, represents an encroachment upon plaintiff's First Amendment guarantees enumerated by the United States Constitution.

b. The arbitrary shakedown of plaintiff's cell during his absence therefrom and without probable cause violates plaintiff's right to be free from unreasonable searches and seizures in contravention of the Fourteenth and Fourth Amendments to the United States Constitution.

c. When defendants removed plaintiff's personal property during his absence, plaintiff's rights to due process of law were encroached upon in contravention

of the Fifth and Fourteenth Amendments to the United States Constitution.

d. That the defendants' search of plaintiff's cell and seizure of personal property therefrom in his absence and without serving any valid State Interest, is violative of plaintiff's rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

e. The plaintiff has no plain, adequate or complete remedy at law to redress the wrongs described herein. Plaintiff has been and will continue to be irreparably injured by the conduct of the defendants unless this Court grants the declaratory and injunctive relief which plaintiff seeks.

26. The only written rules,



regulations or policies governing when inmates cells should be searched, or the procedures for searching them, in existence at any time relevant hereto, are attached hereto as Exhibits E through G. Exhibit E is Rules 27-31 of the Department of Corrections, Adult Division, Joliet Correctional Complex, Employee General Rules. Exhibit F is General Rules and Instructions B of the Department of Corrections, Adult Division, Joliet Correctional Complex, Inmate General Rules. Exhibit G is the Affidavit of Carolyn Harvey together with Department of Corrections, Adult Division, Administrative Regulations, Section Number 401.

27. The lack of adequate guidelines, procedures and safeguards for cell searches has resulted in widespread abuse consisting of searches for which

there was no cause except pure harassment, or searches for the purpose of gaining unwarranted access to prisoners' personal and/or legal property.

28. The search of plaintiff's cell, and the misappropriation and destruction of plaintiff's legal papers and non-legal property are part of a pattern of abuse and deprivation of inmates' constitutional rights by state prison officials.

29. Searches without cause, for purposes of harassment or access to prisoners' property, and the illegal confiscation of inmates' property are practices so widespread that they have become standard operating procedure in the Stateville Branch of the Illinois State Penitentiary.

30. David H. Briarton, Robert J. Kapture, M.B. Hall and Lieutenant Fleming have actual and implied knowledge



of these acts by virtue of their close supervision over prison officials.

31. Because the supervisory officials, Briarton, Kapture, Hall and Fleming have consistently acquiesed in the illegal acts of prison officials, they have allowed the pattern of abuse alleged above to become the policy of the Stateville Branch of the Illinois State Penitentiary.

Prayer for Relief

WHEREFORE, Plaintiff respectfully prays that this Court enter judgment granting plaintiff and members of the plaintiff class:

1. A declaratory judgment that the defendants' acts, policies, and practices described herein violate the rights of plaintiff and the plaintiff class under the United States Constitution.

2. A preliminary and permanent

injunction which:

a. Requires defendants to return plaintiff's and other inmates' personal property.

b. Requires defendant David H. Briarton to rescind the policy of shaking down a cell in a prisoner's absence and confiscating personal property therefrom.

c. Prohibits defendants, their agents, employees, successors in interest and all other persons in active concert or participation with them, from harassing, threatening, punishing or retaliating in any way against plaintiff because he filed this action or against any other prisoners because they submitted affidavits in this case on behalf of plaintiff.

d. Requires defendants to formulate with specificity a plan to the Court within



60 days, delineating a shakedown procedure which will be conducted in the prisoner's presence and comport with the dictates of the United States Constitution.

e. Grant actual and punitive damages in the amount of $10,000.00 to the plaintiff to recompense him for the loss of personal property and the destruction of his legal documents.

f. Grant actual and punitive damages in the amount of $10,000.00 to each member of the plaintiff class who may file a claim for loss or destruction of personal or legal property or harassment and abuse by virtue of cell search by defendants, their officers, employees or agents.

g. The cost of this suit.

h. Grant such additional relief which is necessary and equitable under the circumstances.

Respectfully submitted,

MARTHA M. JENKINS [MILLS]
77 West Washington Street
[33 North Dearborn Street]
Chicago, Illinois 60602
726-3360
[372-8490]

Attorney for Plaintiff



IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| SAMUEL DREW, etc., et al., Plaintiffs, | ) | |
| vs. | ) | No. 73 C 2911 |
| ALLYN R. SIELAFF, etc., Defendants. | ) | |

EXCERPT OF TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the HONORABLE PRENTICE H. MARSHALL, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, April 22, 1977, at 10:30 o'clock a.m.

PRESENT:

MARTHA JENKINS, Esq.,
on behalf of plaintiffs;

RAYMOND McKOSKI, Esq.,
Assistant Attorney General.

on behalf of defendants.

THE CLERK: 73 C 2911, Drew vs. Sielaff, for hearing.

* * * *

MR. McKOSKI: I have one other document that I would ask for leave to file, and that is, as Ms. Jenkins stated, an affidavit from David Brierton, the Warden at Stateville, which in effect states the notice required by this Court's order of February 11th was posted at Stateville.

THE COURT: You want me to sign these extra copies, I take it?

MS. JENKINS: Yes, I would like a signed copy if I could.

There is only one thing left in this case, and that is that in the proposed settlement order, the parties agree and it's understood that I would file, after entry, -- if the order was entered of the final settlement order, a



petition for attorney's fees. That doesn't mean Mr. McKoski wouldn't object to it, but we did agree that I file one.

THE COURT: You will?

MS. JENKINS: Yes.

THE COURT: Fine. Thank you very much, both of you.

I realize, Ms. Jenkins, that you have got a petition for fees coming in. But I still think that you have really done a great job on an appointed basis, and I appreciate it.

MS. JENKINS: Thank you, Judge.

MR. McKOSKI: Thank you, your Honor.

WHICH WERE ALL THE PROCEEDINGS HAD FROM THE EXCERPTED PORTION TO THE CONCLUSION OF SAID HEARING.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| SAMUEL DREW, etc., et al., | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| vs. | ) | No. 73 C 2911 |
| | ) | |
| ALLYN R. SIELAFF, etc., | ) | |
| | ) | |
| Defendants. | ) | |

C E R T I F I C A T E

I HEREBY CERTIFY THAT the foregoing excerpted transcript, consisting of Pages 1 to 3, inclusive, is a true and accurate excerpt of the official shorthand notes taken at the hearing of the above-entitled cause on Friday, April 22, 1977.

RICHARD H. DAGDIGIAN,
Official Court Reporter,
United States District Court,
Northern District of Illinois.

Appendix C

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| SAMUEL DREW, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| -vs- | ) | No. 73 C 2911 |
| | ) | |
| ALLYN R. SIELAFF, et al., | ) | |
| | ) | |
| Defendants. | ) | |

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S PETITION FOR ATTORNEYS' FEES AND COSTS

I. INTRODUCTION

Section 1988 of Title 42 of the United States Code provides that a court, in its discretion, may allow the prevailing party in a civil rights action reasonable attorneys fees. Plaintiff's attorney has petitioned the court pursuant to this provision. Defendants submit

that plaintiff was not the "prevailing party" in this cause and therefore the petition should be denied. Assuming that plaintiff can be termed the "prevailing party" defendants alternatively contend that the equities require this court to exercise its discretion so as to deny recovery of fees and costs.

II. PLAINTIFF DID NOT "PREVAIL."

The original pro se complaint alleged that plaintiff's cell was searched in his absence without probable cause and that certain personal property was wrongfully seized. He sought an injunction ordering a return of his property, requiring an inmate be permitted to be present during a search of his cell, and monetary damages in the sum of ten-thousand dollars. An amendment to the complaint alleged that the lack of adequate guidelines resulted in cell



searches for no other purpose than harassment and gaining unwarranted access to inmate's property. The amendment sought no additional form of relief.

The final settlement order entered April 22, 1977, directed the Department of Corrections to observe the Fourth Amendment and Administrative Regulation 401. It further directed that Department Regulations be amended to provide that a form be filled out after every cell search and that a copy be given to the inmate involved. No finding of cell search abuse was made and Administrative Regulation 401 was found on its face adequate to prevent abuse.

It is submitted that when the original and amended complaint are viewed against the final settlement order plaintiff can not be termed the "prevailing party."

The duty to follow the Fourth Amendment and Administrative Regulation 401 recited in the Settlement Order was a pre-existing duty not one crested by the order. Likewise the Order's further requirement that a form be completed after every search was Department policy long before the order was entered. See, Administrative Regulation 401, effective March 1, 1976, a copy of which is attached as Exhibit A.* The only new duty created by the Settlement Order was that a copy of the search form

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* Nor did the instant litigation spur the adoption of this policy. The policy was in effect prior to the time this settlement possibility was first raised at the pre-trial conference.



would be supplied to the resident of the cell searched. This minor addition does not transform plaintiff, who withdrew all originally requested demands for relief, into the prevailing party, especially since there is no indication that the Department would not have furnished inmates with copies of the search forms if simply asked to do so. Plaintiff did not prevail on any issue raised in the complaint.

III. THE EQUITIES REQUIRE THAT NO ATTORNEYS FEES OR COSTS BE AWARDED.

First the Department has no budgetary allocation for the payment of attorneys fees. If the instant Petition is granted, the Department would be required to pay $18,191.25 out of funds designed for other uses including the upgrading of prison facilities and programs. This award would severely strain a tightly budgeted Department which

performs the crucial role of maintaining state correctional institutions having approximately 10,000 persons. The very goals plaintiffs' attorneys seek to achieve through prisoner civil rights litigation require great monetary outlays. To direct considerable sums away from achieving these goals for use in paying attorneys fees frustrates the purpose of the litigation.

Second, and related to the first point raised above, this is not an isolated case. Virtually every prisoner civil rights case wherein the plaintiff is represented by counsel, counsel is appointed. It can be expected that literally dozens of fee petitions similar to the one before the court will be filed. (See, Beavers v. Sielaff, et al., No. 75 C 317, plaintiff's petition for



attorneys fees in sum of $13,875.25 pending before Judge McGarr.) If these petitions are granted in whole or in part the combined effect will be an enormous drain of vitally needed funds.

Third, although in theory the Department could be the "prevailing party" in a civil rights case it can never recoup its expenditures for attorneys fees and costs since plaintiffs have very little or no money (and usually very little if anything to lose by bringing lawsuits). The Department is required to defend hundreds of suits annually and bear the expense of such defense, with out any chance of recovering fees even in the most frivolous cases.

Fourth, the minor concession gained by plaintiffs, if indeed a concession at all, does not warrant recovery of attorneys fees.

Fifth, there is absolutely no finding or indication that defendants acted other than in good faith in the instant litigation.

Sixth, plaintiff's attorney embarked upon participation in the case with knowledge that her client was unable to pay for her services. It can fairly be inferred that counsels motivation was not profit but public spirit and sense of duty.

Finally, defendants submit that if fees are awarded they should be in an amount much less than that requested in the petition. An hourly rate of $75, while normally not excessive for one of counsel's repute is excessive under the facts set forth above including the financial situation of the Department. A distinction should also be made for



"in-court" and "out-of-court" time. No award should be granted for the time period counsel was an associate in the firm Schiff, Hardin and Waite. Only expenses and fees that accured after October 19, 1976, the effective date of the amendment, should be awarded to avoid denying defendants due process of law.

IV. CONCLUSION.

For the reasons stated above, defendants respectfully request that plaintiff's petition for attorneys fees and costs be denied.

Respectfully submitted,

WILLIAM J. SCOTT
Attorney General
State of Illinois

By: _____
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